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IN THE

Supreme Court of the United States

OCTOBER TERM 1931.

No. 429

IN THE MATTER

of

FOSTER CONSTRUCTION CORPORATION,

Bankrupt,

JOSEPH POPKIN,

Respondent,

D. GINSBERG & SONS, INC.,
(Creditor),

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF THEREOF.

RAYMOND J. MAWHINNEY,
Counsel for Petitioner.

PRESS OF FREMONT PAYNE, INC., 80 WASHINGTON STREET, N. Y.

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The opinions below have been reported in 47 Fed. (2nd) 276 and 50 Fed. (2nd) 693.

The Jurisdiction of this court is invoked under Section 240 (2) of the Judicial Code as amended by the act of February 13, 1925 (28 U. S. C. A. 347).

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This petition presents three important question of bankruptcy law which have not been and should be settled by this court in a case regarded by the District Court as

one of novel impression (R., 61), and involves a question of substance relating to the construction of the authority of the District Court under Section 2, subdivision (15) of the Bankruptcy Act, and which has not been and which should be settled by this court.

The three questions are:

(1) Has the District Court power to issue a writ of ne exeat under the omnibus provisions of Section 2, subdivision (15) of the Bankruptcy Act, when compliance with the provisions of Section 9, subdivision (b) of the Bankruptcy Act is impossible?

(2) Has the District Court power under said Section 2, subdivision (15) of the Bankruptcy Act to issue a writ of ne exeat against an officer of a bankrupt corporation?

(3) Has the District Court power under said Section 2, subdivision (15) of the Bankruptcy Act to issue a writ of ne exeat on the application of a creditor where it appears that demand upon the trustee to make such application would have been unavailing?

As to the First Question.

In the case at bar the Circuit Court of Appeals for the Second Circuit reversed the decision of the District Court and vacated an order for the arrest and detention of the respondent which had been issued by the District Court on the application of the petitioner here, a creditor of the bankrupt corporation, who presented proof that the immediate examination of the respondent was indispensably necessary and that the respondent was about to leave the jurisdiction for the purpose of avoiding such examination. The Circuit Court held that such order could only be made pursuant to the provisions of Section 9, subdivision (b) of the Bankruptcy Act, which provided for the arrest and

detention of bankrupts who were about to leave the jurisdiction to avoid examination, and that this section had not been complied with by the petitioner here. The petitioner here, however, did not apply for the writ under Section 9, subdivision (b) but made its application under the omnibus provisions of Section 2, subdivision (15) of the Bankruptcy Act. The Circuit Court held, however, that Congress having specifically authorized the making of such orders by the provisions of Section 9, subdivision (b), therefore, the general authority to issue such orders contained in Section 2, subdivision (15) of the Bankruptcy Act, "cannot be regarded as extending a power so specifically granted" (R., 77).

This holding, it is submitted, is probably a misconstruction of the omnibus provisions of Section 2, subdivision (15) by which Congress invested the district courts with power "to make such orders, issue such process, *in addition* to those specifically provided, which may be necessary for the enforcement of the provisions of this act." To limit the additive clause to the narrow confines of the specific grants is to ignore not only the very language of the omnibus clause but its manifest purpose.

Congress clearly intended by this section to give the district courts power to "issue such process as may be necessary for the enforcement of the provisions of the Bankruptcy Act", in exigencies to which the specific grants of power did not apply. Proof was made in the case at bar that the issuance of an order of arrest was necessary for the enforcement of the provisions of the Bankruptcy Act, providing for the examination of persons concerning the acts, conduct and property of the bankrupt, for the record discloses that the respondent, president of the bankrupt corporation, had appropriated over $100,000.00 in cash of the corporate assets, and had left the United States with this money, that since his return to this country he had disobeyed the order

and subpoena of the District Court for his examination, had for fifteen months avoided examination, and made impossible the service of process in contempt proceedings upon him and was about to leave the jurisdiction for the purpose of avoiding examination (R., 10, 27/29, 30/34). Furthermore, it was clear upon the face of the papers submitted on the application for the writ ne exeat that compliance with Section 9, subdivision (b) was impossible since the time limitation fixed by that section had expired, and therefore a situation was presented which was not covered by any specific grant contained in the other provisions of the Bankruptcy Act.

As to the Second Question.

The Circuit Court of Appeals in the case at bar held that the District Court is without power to issue a writ ne exeat against the respondent, an officer of the bankrupt corporation. The Circuit Court held that the only statutory authority for the issuance of such a writ is provided by Section 9, subdivision (b) of the Bankruptcy Act, which refers only to the "bankrupt", and Section 261 of the Judicial Code, which refers only to a "party", and that an officer of the bankrupt corporation was neither the "bankrupt" nor a "party."

This holding, it is submitted, is a misconstruction of the powers of the Bankruptcy court under Section 2, subdivision (15) of the Bankruptcy Act, and is in conflict with the applicable decisions of this court, for:

(a) The District Court is authorized under Section 2, subdivision (15) to issue orders imposing restraints upon third parties not bankrupts where such restraints are necessary for the enforcement of the provisions of the Bankruptcy Act. *White* v. *Schloerb*, 178 U. S. 542; *In re Jersey Island Packing Co.*, 138 Fed. 625.

(b) Since the court's power flows from Section 2, subdivision (15) the provisions of the Revised Statutes, Section 717, are irrelevant and impose no restriction on such power. *In re Russell*, et al., 101 Fed. 248.

(c) For the purpose of submitting to examination, the officers of the bankrupt corporation are the "bankrupt" and, therefore, for the purpose of being detained within the jurisdiction and being restrained from leaving the jurisdiction to avoid examination, the officers of the bankrupt corporation should be regarded as the "bankrupt."

As to the Third Question.

The Circuit Court of Appeals held that the writ of ne exeat was improperly granted because applied for by a creditor, and not by the trustee. This holding, it is submitted, is probably untenable and in conflict with the weight of authority for

(a) the powers of the court to make any orders necessary for the enforcement of the provisions of the Bankruptcy Act under Section 2, subdivision (15) are without limitation as to the party at whose application the order is made; (b) a creditor is authorized under Section 21, subdivision (a) of the Bankruptcy Act to procure the examination of persons in bankruptcy; and (c) it is well settled law that a cestui que trust need not show a refusal by a trustee to act after request made of him to act, as a condition precedent to any right of action, where proof is made that a demand would be unavailing. *O'Connor* v. *Virginia Passenger & Power Co., et al.*, 184 N. Y. 46.

In the instant case proof was made that the trustee represented interests adverse to the creditors, would not act, and that it would have endangered the interests of

creditors to have even notified the trustee of the proposed effort to apprehend and detain the officer involved (R., 12, 34/35).

The questions here presented are of great importance and wide interest. Under the conditions of present-day technology and finance, modern business is predominantly conducted by corporations, and corporate bankruptcies involve enormous liabilities to creditors. The Circuit Court of Appeals for the Second Circuit in the instant case has held that the District Court is without power to issue a writ of ne exeat against an officer of a bankrupt corporation, and is without power to prevent him from leaving the jurisdiction for the purpose of avoiding examination, no matter how necessary such examination is for the enforcement of the Bankruptcy Act in the particular case. The decision of the Circuit Court of Appeals in the case at bar is the sole Circuit Court declaration on the subject. There are three District Court opinions which have heretofore considered the subject, but all involve individual bankrupts. *In re Lipke,* 98 Fed. 970; *In re Cohen,* 136 Fed. 999; *In re Berkowitz,* 173 Fed. 1012. Their dicta to the effect that Section 2, subdivision (15) is sufficient authority for the issuance of a writ of ne exeat has been overruled as erroneous by the Circuit Court of Appeals in the case at bar.

WHEREFORE, your petitioner, being without other effective remedy, prays that a writ of certiorari under Section 240, subdivision (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347) be issued out of and under the seal of this Honorable court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and all the proceedings of the

said Circuit Court of Appeals in the said case, entitled "Matter of Foster Construction Corporation, Bankrupt, Joseph Popkin, Appellant," to the end that the said case may be reviewed and determined by this court, and that said judgment of the Circuit Court of Appeals in the said case may be revised and reversed, and that your petitioner may have such other and further relief in the premises as to this court may seem just; and thus your petitioner will ever pray.

D. GINSBERG & SONS, INC.,
By RAYMOND J. MAWHINNEY,
Counsel for D. Ginsberg & Sons, Inc.

I respectfully hereby certify that in my opinion the foregoing is well founded in point of law. It is not filed for delay.

RAYMOND J. MAWHINNEY,
Counsel for Petitioner.

BRIEF

I.

Under a proper construction of Section 2, subdivision (15) of the Bankruptcy Act the District Courts are authorized to issue a writ of ne exeat.

By the provisions of Section 9, subdivision (b) of the Bankruptcy Act, Congress authorized the arrest and detention of bankrupts, but provided that the application must be made before the expiration of one month after the qualification of the trustee, and that the detention could only be had for a period of ten days. These limitations compelled the District Court, *In re Lipke,* to conclude that "considering the manifest insufficiency of Section 9 (b) to secure the effective administration of the act, I cannot doubt it was intended by Section 2, subdivision (15) to authorize the court to make all orders and issue any process necessary." *In re Lipke,* 98 Fed. 970.

Since by the very terms of the omnibus clause in Section 2, subdivision (15) of the Bankruptcy Act Congress *added* general powers to the powers specifically granted, these general powers should be exercised in cases to which such specific grants of power as are provided by Section 9, subdivision (b) do not apply. Thus, Section 11 of the Bankruptcy Act authorizes the District Courts to stay proceedings in suits commenced before the petition in bankruptcy is filed. The courts have unhesitatingly referred to the reservoir of power provided in Section 2, subdivision (15) of the Bankruptcy Act for authority to stay suits commenced *after* the petition is filed, "since the stay of suits against the bankrupt is absolutely necessary to give effect to

the Bankruptcy Act." *In re Basch,* 97 Fed. 761. The expeditious examination of officers of the bankrupt corporation, particularly the examination of an officer who has appropriated its funds, is not less absolutely necessary to give effect to the Bankruptcy Act.

The facts in the case at bar present a particularly arresting state of facts justifying the issuance of the writ herein. As the District Court in the case at bar stated:

> "Certainly the order here complained of is necessary under the circumstances here alleged—of which the truth is not challenged—in order to enforce the provisions of the Bankruptcy Act in connection with this bankrupt's estate" (R. 63).

II.

Under a proper construction of Section 2, subdivision (15) the District Court is authorized to issue orders directing the arrest and detention of officers of bankrupt corporations.

The holding of the Circuit Court of Appeals in the case at bar that a writ of ne exeat is not issuable against an officer of a bankrupt corporation ignores the latitude of the power vested by Congress in the District Court by the omnibus provisions of Section 2, subdivision (15). The power to issue orders necessary for the enforcement of the Bankruptcy Act is not limited to bankrupts. It is under this very section that District Courts have issued orders imposing restraints on third parties not bankrupts. Thus, in *White* v. *Schloerb,* 178 U. S. 542, this court held that under said Section 2, subdivision (15) the District Courts could compel persons to restore property to the estate of bankrupts. In *In re Jersey Island Packing Co.,* 138 Fed. 625, the court directed the restraint not only of

the bankrupt but of any other party from making any transfer or disposition of the debtor's property. Section 2, subdivision (15) contains no limitation whatsoever as to the party against whom such an order is issuable.

It is of the greatest importance that in corporate bankruptcies the individuals who are the officers of bankrupt corporations should be subject to such process as is provided by the writ ne exeat. Corporations act necessarily by and through individuals. Unquestionably, the fiction of corporate entity and the distinction between the corporation as an entity and the human beings who are interested in it, is an essential one for a variety of purposes. But where it would stultify logic and work an obvious circumvention of justice to insist upon the distinction and to fail to recognize the fact that the activities of the corporation are the activities of human beings in behalf of the corporation, the courts have been quick to look to the natural persons, and to direct their commands and prohibitions to them directly.

Section 7, subdivision (9) of the Bankruptcy Act requires the bankrupt to "submit to examination." It must be clear that, for the effective administration of the Bankruptcy Act, in so far as the corporate bankrupts are concerned, these duties must be regarded as the duties of the natural persons "in esse", who have had the conduct and management of the corporation's business in their hands.

It is submitted that the power of the court to compel obedience to its orders by officers of a bankrupt corporation is a necessary incident to the general power of the court of bankruptcy granted it under Section 2, subdivision (15) to make any orders necessary for the effective administration of the Bankruptcy Act.

The District Court in the case at bar was, indeed, fully persuaded that "if this court did not have the

power here invoked and exercised dishonest officers of bankrupt corporations could flout the bankruptcy law with impunity" (R., 63).

III.

Under a proper construction of the powers of the District Court under Section 2, subdivision (15) of the Bankruptcy Act, the District Court has power to issue a writ of ne exeat on the application of a creditor.

The Circuit Court of Appeals in the case at bar held that the order was improperly granted below because it was applied for by a creditor and not by the trustee, citing *In re Lewensohn,* 121 Fed. 538. That case was concerned with the right of a creditor to appeal from an allowance of the claim of another creditor. It presents facts in no way analogous to the situation presented in the case at bar.

Section 2, subdivision (15) of the Bankruptcy Act, which invests the court with the power to make "any orders or issue any process necessary for the enforcement of the provisions of the Bankruptcy Act", does not limit the power of the court to cases where the application for the exercise of the power is made by a trustee in bankruptcy. Section 21, subdivision A of the Bankruptcy Act, indeed, provides that "a court of bankruptcy may, upon the application of any officer, bankrupt, or *creditor,* by order require any designated person to appear in court to be examined concerning the acts, conduct and property of the bankrupt." (Italics ours.)

In the instant case, a creditor of the bankrupt who had filed its claim, had applied for and procured an order directing the examination of the appellant, and had then applied for and procured the writ of ne exeat. Since the court had authority to make the order direct-

ing the examination of the respondent at the instance of a creditor, then, under Section 2, subdivision (15) it had the general power to make any order at the instance of a creditor necessary for the enforcement of its order directing the examination of the respondent.

Furthermore, the facts here disclosed would clearly justify the granting of the order at the instance of the creditor, instead of the trustee in bankruptcy. The facts presented to the court below made it entirely clear that any request by creditors addressed to the trustee in bankruptcy to act against the respondent would not only have been futile but would have been prejudicial to the interests of creditors, for the trustee represented interests adverse to the creditors, had formerly been the respondent's attorney and sustained such relations with the respondent that it would even have endangered the interests of creditors to have notified him of the application (R., 11-12, 34-5, 43-4).

Courts of equity which have forbidden cestuis que trust from taking action unless the trustee refuses to act, have recognized the rule of equity that the request need not be made if it would be futile, if, e. g., the trustee by his conduct had made it clear that he would not act if requested. *O'Connor* v. *Virginia Passenger and Power Co., et al.*, 184 N. Y. 46.

CONCLUSION.

The vital importance of the questions here presented and the absence of final authoritative construction by this Court of the sections of the Bankruptcy Act involved merit the granting of the writ here applied for.

Respectfully submitted,

RAYMOND J. MAWHINNEY.

APPENDIX

(BANKRUPTCY ACT OF 1898, AND ITS AMENDMENTS.)

SECTION 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories, and the United States Courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held to * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

SECTION 7, SUBDIVISION a. The bankrupt shall * * * (9) when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate. * * *

SECTION 9, SUBDIVISION b. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustees, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has

his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

SECTION 21, SUBDIVISION a. A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. * * *